Supreme Court, U.S.
FILED
JUL 9 1992
OFFICE OF THE CLERK

92-587

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CARLYLE L. HARRISON - PETITIONER

vs.

MONTVERDE ACADEMY - RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Carlyle L. Harrison, Petitioner
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QUESTIONS PRESENTED

1. IS A CITIZEN DENIED DUE PROCESS RIGHTS WHEN: 1) a "HEARING" IS HELD BEFORE A STATE OF FLORIDA CIRCUIT JUDGE; 2) AN ORDER IS EXECUTED BY ANOTHER STATE OF FLORIDA CIRCUIT JUDGE, WITHOUT FINDINGS OF FACT OR CONCLUSIONS OF LAW; 3) THE STATE OF FLORIDA APPELATE COURTS, BY LAW, CAN ONLY "AFFIRM" THE CIRCUIT COURTS BECAUSE THERE ARE NO FINDINGS OF FACT OR CONCLUSIONS OF LAW, AND; 4) THE STATE OF FLORIDA SUPREME COURT IS WITHOUT JURISDICTION TO REVIEW LOWER COURT DECISIONS WITHOUT OPINION, PER U.S. CONST. AMEND. 14?

2. IS FLORIDA RULE OF APPELLATE PROCEDURE 9.200(b)(4) SELF-EXECUTING AND, IF SO, DOES DENYING A CITIZEN OF THE BENEFITS OF THAT RULE ALSO DENY A CITIZEN OF PROCEDURAL DUE PROCESS RIGHTS?

3. IN VIEW OF SURROUNDING CIRCUMSTANCES, DID CARLYLE L. HARRISON RECEIVE A FAIR "HEARING" ON APRIL 29, 1991 IN LAKE COUNTY CIRCUIT COURT, STATE OF FLORIDA FIFTH JUDICIAL DISTRICT BEFORE CIRCUIT JUDGE ERNEST C. AULLS, JR., AS PROVIDED IN U.S.C.A. CONST. AMEND. 14?

THE PARTIES

The parties set forth in the caption were only parties in the lower courts and are the only parties in this proceeding.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
THE PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES CITED . .	iv-vi
INDEX TO APPENDIXES "A"-"Q" .	vii-viii
OPINIONS BELOW	2
JURISDICTION	2
CONSTUTIONAL PROVISIONS INVOLVED	3
FLA. R. APP. PROC. INVOLVED . .	3
STATEMENT OF THE CASE	3
ARGUMENT	7
CONCLUSION	36

TABLE OF AUTHORITIES CITED

FEDERAL CASES	Page(s)
Compton v. Naylor, 392 F. Supp. 575 (1975)	34
Craig v. Carson, 449 F. Supp. 385 (1978)	34
Fuentes v. Shevin, 92 S. Ct. 1983 (1972)	34
Gordon v. Leatherman, 325 F. Supp. 494 (1971	34
United States of America v. Wood, Wire, and Metal Lathers International Union, Local Union No. 46, 471 F. Rep. 2d 408 (1973)	12
FLORIDA CASES	
Beasley v. Beasley, 463 So.2d 1248 (Fls. 5th DCA 1983)	17
Bei v. Harper, 475 So.2d 912 (Fla. 2nd DCA 1985)	23
Boylan v. Boylan, 571 So.2d 580 (Fla. 4th DCA 1990)	29
Carter v. Carter, 504 So.2d 418 (Fla. 5th DCA 1987)	18
Drs. Baerman, Weil & Snyder, P.A. v. Sturman, 474 So.2d 6 (Fla. 4th DCA 1985)	20,24
E. H. v. Department of Health and Rehabi;itative Services, 571 So.2d 50 (Fla. 1st DCA 1991)	23
Ed Ricke and Sons, Inc. v. Green, 468 So.2d 908 (Fla. 1985)	35

Florida PSC v. Pruitt, Humphries, et al, 587 So.2d 561 (Fla. 1st DCA 1991) 34

Garcia v. State, 578 So.2d 325 (Fla. 4th DCA 1991) 25

Haist v. Scarp, 366 So.2d 402 (Fla. 1978) 27

International Community Corp. v. Orange Entertainment Center, Inc., 490 So.2d 169 (Fla. 5th DCA 1986) 12

Jenkins v. State, 385 So.2d 1356 (Fla. 1980) 29

Kuenstler v. Andreasen, 386 So. 2d 896 (Fla. 1st DCA 1980) 7,12

Parker v. Nix, 580 So.2d 178 (Fla. 1st DCA 1991) 21

Thomas v. Thomas, 495 So. 2d 668 (Fla. 5th DCA 1986) 19

Warner and Swasey Company v. Insurance Co. of No. Amer., 292 So.2d 45 (Fla. 2nd DCA 1974) 35

Wright v. Wright, 431 So.2d 177 (Fla. 5th DCA 1983) 11,21

OTHER AUTHORITIES

Florida Rules of Court (State), West Publishing Company (Saint Paul, Minnesota, 1991) ... 13

[Florida] Constitution of 1968 (Preamble) 5

Florida Rules of Appellate Procedure, Rule 9.200 3-29

Florida Rules of Civil Procedure, Rule 1.420(e) 7

U.S.C.A. Constitutional Amendment 14, Section 1 3

INDEX TO APPENDIXES "A"-"Q"

Appendix	Description
"A"	Lake Co. Cir. Ct. "Order of Dismissal".
"B"	5th DCA "Per Curiam Affirmed" decision of March 24, 1992.
"C"	5th DCA "Rehearing denied" order of April 9, 1992.
"D"	Supreme Ct. of Florida "Without Jurisdiction" dismissal.
"E"	The Academy's "Motion to Dismiss" appeal.
"F"	"Response to Appellee's Motion to Dismiss" appeal.
"G"	5th DCA Order denying appellee's "Motion".
"H" 1-3	Motion to Reinstate Complaint.
"I"	"Conclusion of Initial Brief" to 5th DCA.
"J"	"Notice of Failure to Prosecute and Notice of Hearing".
"K" 1-10	U.S. Const. Amend. 14 and Fla. Rule of App. Proc. 9.200.
"L"	Letter to Hon. James C.Watkins.
"M"	Letter to Hon. Ernest C. Aulls, Jr.
"N"	Letter to C. Michael Duncan.

(Continued)

(Index to Appendixes-Continue)

"O"	Letter to West Publ. Co.
"P"	Letter from West Publ. Co.
"Q"	transcript of April 29, 1991 "hearing" taken by Carl S. Harrison.

No. _____

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

October Term, 1992

CARLYLE L. HARRISON - PETITIONER

v.

MONTVERDE ACADEMY - RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, Carlyle L. Harrison, respectfully prays that the United States Supreme Court will issue a writ of certiorari to review the Order of the Circuit Court of Lake County, Florida, Florida Fifth Judicial Circuit, rendered July 9, 1991 and subsequent affirmance of that Order by the Florida Fifth District Court of Appeal and the dismissal of the appeal of that Order by the State of Florida Supreme Court for lack of jurisdiction.

OPINIONS BELOW

There are no opinions below.

JURISDICTION

Lake County Circuit Court, State of Florida, Fifth Judicial Circuit issued an Order of Dismissal, without opinion, July 9, 1991. The Florida Fifth District Court of Appeal affirmed the lower court with Decision filed, without opinion, March 24, 1992. A Motion for Rehearing was denied April 9, 1992. Appeal to the Supreme Court of Florida resulted in the following decision, without opinion, on May 26, 1992: "It appearing to the Court that it is without jurisdiction, the Petition for review is hereby dismissed." This Court's jurisdiction is invoked under Title 28, U.S.C. § 1257(3) and Title 28 U.S.C. § 2106.

CONSTITUTIONAL LAW AND FLORIDA RULES INVOLVED

1. U.S.C.A. Const. Amend. 14 (Appendix "K-1").
2. Florida Rule of Appellate Procedure 9.200 (Appendix "K-1 through 10").

STATEMENT OF THE CASE

Petitioner (Harrison) filed Complaint upon respondent (the Academy) on February 13, 1990 for "overtime wages in excess of ten thousand dollars" and alleging the Academy was liable for said wages under the Fair Labor Standards Act of 1938, as Amended, Title 29, Code of Federal Reglations.

The Academy moved for dismissal March 6, 1990. Harrison answered the Academy's motion and amended the complaint March 15, 1990. That motion has not been ajudicated.

Harrison was served Notice of Failure to Prosecute and Notice of Hearing (Appendix "J") April 4, 1991 and responded to same April 17, 1991 (Appendix "L") alleging

a stroke suffered April 10. 1990 and other medical problems as "good cause" for failure to prosecute in a timely fashion.

A "Hearing" was held April 29, 1991 before circuit judge Ernest C. Aulls, Jr., in Lake County Circuit Court, Fifth Judicial Circuit of Florida.

Harrison filed Motion to Reinstate Complaint (Appendix "H") May 21, 1991 wherein he made a "statement of the * * * proceedings" pursuant to Florida Rule of Appellate Procedure 9.200(b)(4) (Appendix "K").

The Motion to Reinstate Complaint (Appendix "H" contained, by implication, the federal question sought to be reviewed. They were raised by Harrison's "statement of the * * * proceedings" pursuant to Florida Rule of Appellate Procedure 9.200(b)(4) (Appendix "K-4").

The Conclusion of Appellant's Initial Brief (Appendix "I") of September 24, 1991 to the Florida Fifth District Court of Appeal contained, by implication, the federal questions sought to be reviewed. Petitioner's Jurisdictional Brief of May 13, 1992 to the Florida Supreme Court specifically pointed out that: 1) he was entitled to "equal civil . . . rights"; 2) "the courts shall be open to every person", and; 3) "appeals . . . shall be a matter of right" (Preamble Constitution [Florida] of 1968) and further "Harrison argues that his due process rights are expunged with * * *" and "Petitioner has been denied procedural due process rights * * *" at pages 7 and 9 of petitioner's brief.

Order of Reassignment to circuit judge Don F. Briggs was filed June 3, 1991.

Judge Briggs filed an Order of Dismissal

(Appendix "A") July 9, 1991 without opinion, findings of fact or conclusions of law.

Notice of Appeal to the Florida Fifth District Court of Appeal was filed with the lower court August 1, 1991.

The Academy moved to dismiss the appeal on grounds that dismissal was "without prejudice". Harrison answered in opposition to the motion on grounds that "without prejudice" was of no consequence as the statute of limitations had run. An Order was issued August 29, 1991 denying the Motion to Dismiss (Appendixes "E", "F" and "G").

The Florida Supreme Court on May 26, 1992 replied to Harrison's appeal to that court with, "It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed." (Appendix "D").

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because: 1) the petitioner has been denied due process rights, and; 2) he did not receive a fair hearing April 29, 1991.

On April 4, 1991 Harrison was served a Notice of Failure to Prosecute and Notice of Hearing.(Appendix "J").

Harrison responded April 17, 1991 to the notice--twelve days before the hearing date. He went to great lengths to notify all parties (the judge, the court clerk and opposing counsel)(Appendices "L", "M" and "N") and he gave "medical reasons" as his "good cause" for failure to prosecute.

Harrison questions the adequacy, on technical grounds, of the form Notice of Failure to Prosecute and Notice of Hearing. Fla. R. Civ. P. 1.420(e) states "by the court on its own motion or on the motion of

any interested person, whether a party to the action or not".

There has been no motion to dismiss entered in this cause. Nothing in the record even implies there has been a motion to dismiss. The form Notice of Failure to Prosecute and Notice of Hearing neglects to mention a motion to dismiss (Appendix "J").

A "hearing" was held April 29, 1991. The case was dismissed on that date.

Harrison filed Motion to Reinstate Complaint May 21, 1991 wherein he made a "statement of the * * * proceedings" as provided in Fla. R. App. P. 9.200(b)(4) (Appendix "K"). Harrison's "statement" was, "1. A hearing was held from 11;40 until 11;46 before judge Ernest C. Aulls, Jr., on April 29, 1991, in chambers, and at this hearing he found Carlyle L. Harrison guilty of "Failure to Prosecute" the above-titled cause and dismissed the action.

At the hearing judge Aulls stated, "I have a strict policy that if nothing is done on a case in a year I dismiss them automatically. Goodbye".

Fla. R. App. P. 9.200(b)(4) (Appendix "K") provides for the situation "If no report of the proceedings was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. * * *,"

Harrison did exactly that in his Motion to Reinstate Complaint (Appendix "H") and he did it in paragraph "1" in an attempt to be emphatic.

The rule goes on to say "The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days of service. * * *."

It was stipulated "the appellee, who MAY serve objections or proposed amend-

ments". Harrison immediately checked Fla. R. App. P. 9.300(a) to see if something under the heading of "MOTIONS" negated Rule 9.200(b)(4). It did not. Counsel was under no obligation to respond to either the statement or the motion.

The rule continues "Thereafter, the statement and any objections or proposed amendments shall be submitted to the lower tribunal for settlement and approval. * * *." The Academy was served the statement at both the lower tribunal level as Motion to Reinstate Complaint and at the appellate level as part of the appendix of Oral Argument Synopsis (dispensed with) attached to, and part of, Motion for Rehearing (Appendix "C").

The rule ends "As settled and approved, the statement shall be included by the clerk of the lower tribunal in the record."

As "the clerk of the lower tribunal * * *

included the statement in the record Harrison had to presume the statement was "settled and approved".

Thus, it appears Fla. R. App. P. 9.200 (b)(4) provides ample protection of due process rights.

However, the seemingly protective rule is negated by Wright v. Wright, 431 So, 2d 177 (Fla. 5th DCA 1983) which states at page 178 (left column):

> In attempting to reconstruct the evidence, the judge observed that the trial was held more than five months ago, and that he had virtually no recollection of the testimony independent of his notes. As a consequence, the judge stated that he could only settle certain factual disputes.

Therefore, rule 9.200 (3), as reported, is of little value to any process in which the judge merely has to say "I don't remember".

Also, there is no rule nor statutory requirement for the statement.

In short, Rule 9.200 is poorly written and is "an exercise in futility" to some people using same.

In International Community Corp. v. Orange Entertainment Center, Inc., 490 So. 2d 169 (Fla. 5th DCA 1986) it states "Lower Court must be affirmed if there is valid basis in the record for doing so, where it has failed to state the basis for its decision and made no findings of fact."

This appears to be repugnant to United States of America v. Wood, Wire and Metal Lathers International Union, Local Union No. 46, 471 F. Rep. 2d 408 which states at page 410, under 9. Constitutional Law:

> Due process requires that facts upon which judgment [Order] is based be made known to the parties. U.S.C.A. Const. Amend. 14.

The ONLY fact made known to Harrison on April 29, 1991 by judge Ernest C. Aulls, Jr. was the "statement of the * * * proceedings"

as reported by Harrison (Appendix "H", paragraph "1") "I have a strict policy that if nothing is done on a case in a year I dismiss them automatically. Goodbye."

This deprived Harrison of his substantial due process rights as well as his procedural due process rights. In addition, it was an abuse of discretion on the part of judge Aulls.

To further show the courts of Florida had little intention of allowing Fla. R. App. P. 9.200 to be used effectively, please refer to Appendices "O" and "P".

This rule has been misreported since its inception with, apparently, nobody challenging the rule.

The "Committee Notes" at page 551 in Florida Rules of Court (State), West Publishing Company (Saint Paul, Minnesota, 1991) states (right column) "Subsection (b)(3) provides the procedure to be followed

where no transcript is available." Subsection (b)(4) NOT Subsection (b)(3) provides * * *.

There are no "Committee Notes" for Subsection (b)(4).

Petitioner argues that even assuming Rule 9.200 (b)(4) has some validity it can also be capricious and arbitrary if used with indescretion.

The PER CURIAM "ORDER RELATING TO RECORD ON APPEAL" in Kuenstler v. Andreasen, 386 So. 2d 896 (Fla. 1st DCA 1980) presents a case so similar to this case that it is even appealed by a pro se litigant:

> This is an appeal from a final order determining a dispute as to possession and title to certain real property in favor of Appellee (Defendant and Counter-Plaintiff below). No report or transcript of the trial proceedings was made, for neither party secured the attendance of a court reporter at trial. Appellant thus prepared and served upon Appellee a substitute statement of the proceedings. Appellee did not serve any objections or proposed amendments thereto; however, he did move to strike the

document on the ground that he had not certified it. Appellant then filed with the trial court a motion to settle and approve his statement of the proceedings without amendment. Appellant's motion was denied by the trial judge, who ruled that he could not sufficiently recall the proceedings to approve or reconstruct a record thereof. Appellant now moves the court to recognize his statement of the proceedings as if it had been settled and approved pursuant to Florida Rule of appellate Procedure 9.200(b)(3) (sic). He moves, in the alternative, that the Court direct Appellee to review the document and submit any objections or proposed amendments thereto to the trial court for settlement of differences and ultimate approval in accordance with the above-cited Rule.

NOTE: The above-cited Florida Rule of Appellate Procedure 9.200 (b)(3) is erroneous and should be Florida Rule of Appellate Procedure 9.200(b)(4).

We are of the view that the ends of justice will be better served by a second attempt to reconstruct a record of the trial proceedings.. There is no requirement in the above-cited Rule that Appellee certify Appellant's statement of the proceedings prior to its approval by the trial court and subsequent inclusion in the record. Rather, we think the cited Rule requires Appellee to make specific objections and proposed amendments (if he has any) going to the factual basis of Appellant's document. Such a requirement is consonant with Appellee's duty to

> assist in the preparation of the record and thus insure that the appeal be decided on its merits. The trial judge should then act as arbiter of any factual dispute between the parties. In remanding this cause, we are not unmindful of the trial judge's professed inability to recall the proceedings, and he may or may not have sufficient recollection to settle specific disputes as to objections or proposed amendments filed by Appellee. Such is unknown at this point, however, because Appellee has not complied with the Rule. A second attempt should be made to reconstruct the record of the trial proceedings which substantially complies with Florida Rule of Appellate Procedure 9.200(b)(3) (sic--should be (b)(4).
>
> Accordingly, for the reasons expressed above, this Court remands jurisdiction in this cause to the trial court with directions that Appellee be required to file specific objections and proposed amendments (if he has any) to Appellant's statement of the proceedings and then for the trial court to take such further measures as are necessary and proper in accordance with Florida Rule of Appellate Procedure 9.200(b)(3) (sic--should be (b)(4).

Thus we have the 1st DCA which "goes to great lengths" to have every advantage of Fla. R. App. P. 9.200(b)(4) applied and the 5th DCA which also "goes to great lengths"

to have those advantages nullified.

AND, Harrison disagreeing, on technical grounds, with both courts.

Beasley v. Beasley, 463 So. 2d 1248 (Fla. 5th DCA 1985)--Judge Dausch notes [1-3]:

> This is an appeal in a marriage dissolution case. Although appellant presents a compelling argument for the reversal or modification of an alimony award he has not furnished this court with a transcript of the evidence taken at trial which led to the court's decision. Financial affidavits, without supporting testimony, are not sufficient for for our review of a case. Unless this court is provided with ALL (empasis added) of the evidence which was before the trial court, either by a transcript of testimony or a stipulated statement, then we cannot fault and reverse a trial judge for a purported error.

The 5th DCA requires ALL the evidence "which was before the trial court", however, "a stipulated statement", Fla. R. App. P. 9.200(a)(3), has no such requirement (Appendix "K").

"We cannot fault and reverse a trial judge for a purported error". This may not

be true. Perhaps Judge Dausch should have said "We will not * * *". When the purported error is substantiated by uncontroverted statement and is of such a nature as to preclude the necessity of additional evidence and testimony and the purported error and the weight of the evidence is overwhelmingly shown as sufficient for reversal, then it should be reversed.

Carter v. Carter, 504 So. 2d 418 (Fla. 5th DCA 1987) at 3. Appeal and Error is of the view that:

> Rule of appellate procedure, providing that where record is incomplete, court shall direct party to supply omitted parts, did not encompass situation where appellant failed to present record or stipulated statement of proceedings below. West's F.S.A. R. App. P. 9.200(f)(2).

Fla. R. App. P. 9.200(f)(2) stipulates "If the court finds the record is incomplete, it SHALL (emphasis added) direct a party to supply the omitted parts of the record * * *".

And, "* * * No proceeding shall be determined because the record is incomplete until an opportunity to supplement the record has been given.:

Therefore, unless it is rewritten, it is tantamount to this procedure that the court will not proceed until it directs the parties to supply the ommitted parts.

The only time requirement is upon the "lower tribunal" which must act "before the record is transmitted" (Appendix "K", Fla. R. App. P. 9.200(f)(1).

Thomas v. Thomas, 495 So. 2d 688 (Fla. 5th DCA 1986) construes Fla. R. App. P. 9.200(f)(2) as not requiring action by the court for the same reasons outlined in Carter, above.

Thomas further stated at page 670:

> . . . [T]hat appellant has the burden to submit to the appellate court a record adequate to support the appeal. Wright v. Wright, 431 So. 2d 177 (Fla. 5th DCA 1983) The creation of Rule

> 9.200(f)(2) which became effective on March 1, 1978, did not abolish the appellant's burden. As the 1977 Advisory Committee and Court's Commentary noted, the purpose of the rule is to assure portions of the record material to a decision will be available to the appellate court. It was not intended to cure inadequacies in the record which are the result of a party's failure to make a record during proceedings in the trial court.

It appears that the 1st DCA did just that in Kuenstler, i. e., "cure inadequacies in the record".

Thomas goes on--:

> The case of Drs. Berman, Weil & Snyder, P.A. v. Sturman, 474 So. 2d 6 (Fla. 4th DCA 1985), relied upon by the appellant, is distinguishable. It concerned a circuit court appellate review of action by a county court with an inadequate record basis to do so. The appellants there had partially complied with the requirements of Florida Rule of Appellate Procedure 9.200(b)(3) (sic--should be (b)(4), but had failed to submit the proposed statement of evidence to the lower tribunal for settlement and approval. On certiorari review, the Fourth District granted certiorari and quashed the circuit court's order, holding, as a part of its discretionary review, that the appellants (respondents on certiorari) should be given further opportunity to build a record

> for review by the circuit court pursuant to Rule 9.200(f)(2), presumably by obtaining the county court's approval of the proposed starement. If Berman can be construed as requiring a second opportunity to create a record per Rule 9.200 even after filing of the appellate record with the appellate court, we disagree with it and adhere to our rationale in Beasley.

Wright v. Wright, 431 So. 2d 177 (Fla. 5th DCA 1983) implies a COMPLETE record is necessary before it shall be considered adequate, at 3. Appeal and Error:

> Statement of evidence provided for by appellate rule when full transcript of lower court proceedings is unavailable may be substituted for report or transcript ONLY (emphasis added) when all relevant factual disputes have been settled and statement of evidence is approved by lower tribunal; when trial court specifically states that it cannot settle ALL (emphasis added) relevant factual disputes, statement of evidence does not constitute COMPLETE AND ADEQUATE RECORD (emphasis added) for appellate review. West's F.S.A. R. App. P. Rule 9.200(b)(3) (sic--should be (b)(4).

Observe now the completely opposite application of Fla. R. App. P. 9.200 in Parker v. Nix, 580 So. 2d 178 (Fla. 1st

DCA 1991) at page 180:

> [1] Appellee Nix argues that the appeal should be dismissed for failure to present an adequate record. Nix filed in this appeal a motion to strike appellant Parker's initial brief and to dismiss the appeal, asserting a violation of Fla. Rule of App. Proc. 9.200(e). This court denied the motion without prejudice to raising the issue by brief. Thereafter, we relinquished jurisdiction to the trial court to permit the parties to prepare an approved statement of evidence. The appellate record now contains the parties' stipulated statement of evidence, and the documentary evidence itself. We find the stipulated record adequately supplies the factual bases (sic) for resolving the underlying dispute.

NOTE: Fla.R. App. P. 9.200(e), mentioned above, is:

> The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or appellant. Any party may enforce the provisions of this rule by motion.

Harrison argues that if there is not some change in the burden of preparing and transmitting the record, then there is no need for this rule. The enforcing clause

may be the change. Thusly the 5th DCA is using tenets of law outside the bounds of Rule 9.200, to rule against Rule 9.200.

E. H. v. Department of Health and Rehabilitative Services, 571 So. 2d 50 (Fla. 1st DCA 1991) at 2. Administrative Law and Procedure says:

> Agency's failure to preserve record of hearing on request for expunction of confirmed report of child abuse did not amount to reversible error; only issue raised by alleged abuser on appeal was that there was sufficient evidence to support finding that there was episode of abuse, and no argument was presented that agency's failure rendered record insufficient as to matter of law or that statement of evidence produced by way of settlement of evidence was legally insufficient. West's F.S.A. § 120.57 (1)(b)7; West's F.S.A. R. App. P. Rule 9,200(b)(4).

Now comes the 2nd DCA in Bei v. Harper, 475 So. 2d 912 (Fla. 2nd DCA 1985) which sides with the 5th DCA as to reconstruction of the record, at page 915:

> [1] Second, even if we were persuaded to overlook this procedural irregularity. we think it would be futile to re-

linquish jurisdiction again to the trial judge for reconstruction of the record. * * *.

Drs. Berman, Weil & Snyder, P.A. v. Sturman, 474 So. 2d 6 (Fla. 4th DCA 1985) previously cited in Thomas, add, at page 7, under 2. Appeal and Error:

> Appellants who prepared statement of evidence in lieu of a transcript, but who failed to submit proposed statement to lower tribunal for settlement and approval did not meet burden of furnishing a record. West's F.S.A. R. App. P. Rule 9.200(b)(3) (sic--should be (b)(4).

Chief Judge Hersey comments, at page 7, commencing at last two lines of left column:

> * * * Respondents urge that they prepared a statement in lieu of a transcript and served it on petitioners, who did not cooperate by either agreeing or objecting to it. However, they did not go far enough. They failed to submit the proposed statement of evidence to the lower tribunal for settlement and approval. See Fla. R. App. P. 9.200(b)(3) (sic--should be (b)(4). The burden was theirs to furnish a record; they did not meet that burden. Kauffmann v. Baker, 392 So. 2d 13 (Fla. 4th DCA 1980): Kuenstler v. Andreasen, 386 So. 2d 896 (Fla. 1st DCA 1980).

> On remand the respondents should be given further opportunity to build a record for review by the circuit court pursuant to Rule 9.200(f)(2), Florida Rules of Appellate Procedure.

Harrison argues that petitioners are under no obligation to "cooperate by either agreeing or objecting" to the proposed statement pursuant to Rule 9.200(b)(4) or (f)(2). Rule 9.200(b)(4) states specifically:

> * * * The statement shall be served on the appellee, who MAY (emphasis added) serve objections or proposed amendments thereto within 10 days of service * * *.

In this instance the 4th DCA sends the case back for reconstruction even though the case has been through one appeal by the circuit court.

However, Garcia v. State, 578 So. 2d 325 (Fla. 4th DCA 1991), at page 327, left column, second paragraph, has this perspective:

> * * * Because no court reporter attended the hearing, no transcript exists. However, a record can be perfected without a transcript. When no transcript is available a statement of the

proceedings may be prepared. Fla. R. App. P. 9.200(b)(4).

> It is not a necessary prerequisite to appellate review that the record on appeal contain a verbatim transcript of the evidence and events transpiring at the [hearing]. On the contrary, a summarized statement in narrative form may furnish a substantially accurate account of the rulings of the trial judge and the basis on which they were involved. Such statement may be prepared from notes kept by counsel; from the judge's notes; from the recollection of counsel, the judge and witnesses as to what occurred . . .

And further, at the last sentence of text at page 327, right column and following:

> * * * Although rule 9.200(b)(4) states "appellant" may prepare a statement of the evidence or proceedings", I respectfully suggest that such wording does not preclude an appellee from also preparing the statement. To adopt Garcia's argument would permit him to prevent the reconstruction of the authorized ex parte hearing that he had no right to attend.

The latter is Judge Garrett's dissenting opinion, however, it does elucidate the problems which can arise from Fla. R. App. P. 9.200.

However, the Supreme Court of Florida would seem to overrule most of the "proposed statements" rendered under Fla. R. App. P. 9.200 in Haist v. Scarp, 366 So. 2d 402 (Fla. 1978) which holds at page 404, under [3]:

> An accurate and comprehensive record of the proceedings below is absolutely essential to fair and efficient appellate review. This Court should provide every incentive to parties to develop and preserve an adequate record. We trust this decision will serve as such an incentive.

Petitioner respectfully disagrees with the Florida Supreme Court as it has placed the incentive at "the wrong end of the cart". The incentive to prepare a record should be given at the very first instance of a case BEFORE any testimony is taken at the first appearance, or, by NOTICE in writing before a case comes to court. The Florida Supreme Court has, in effect, provided a WARNING not to "get caught" again (I would doubt that it happens that anyone

[of sound mind] a second time--getting in a position of not having an "adequate record" which accordingly is a complete and unexpurgated version of events at trial/hearing).

As such, the admonishment should be a forewarning as in Miranda case, not an afterthought as in Haist.

However, the Florida Supreme Court does say at page 403, at 2. Appeal and Error:

> It is duty of parties to properly establish and prepare record on appeal and it is they who must suffer consequences, not the courts, when duty is not fulfilled. 32 West's F.S.A. Florida Appellate Rules, rule 3.6 [Rule 3.6 was the antecedent rule from which Fla. R. App. P. was "spawned"].

This case was ruled upon December 14, 1978. Fla. R. App. P. 9.200 which replaced Rule 3.6 became effective October 1, 1978. Although the high court was instrumental in creating Fla. R. App. P. 9.200 it seems reluctant to give it credence.

And again in Boylan v. Boylan, 571 So. 2d 580 (Fla. 4th DCA 1990) the court holds at [3]:

> When there is no record of the witnesses' testimony and the evidentiary rulings and when a statement of the evidence has not been approved by the trial court pursuant to Florida Rule of Appellate Procedure 9.200(b)(3) (sic--should be (b)(4) then record is not adequate for appellate review. Wright. * * *.

In the Supreme Court of Florida decision that it was without jurisdiction, it cited Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

Jenkins says at 3. Courts:

> Regardless of whether District Courts of Appeal's per curiam decisions, which are rendered without opinion, are accompanied by a dissenting or concurring opinion, Supreme Court lacks jurisdiction to review such a decision for alleged conflict with a decision of another District Court of Appeal or Supreme Court. WEST"S F.S.A. Const. Art. 5, §§ 3, 3(b)(3).

In short, what this entails is--if the District Courts of Appeal have a case that is liable to be overturned they merely mark it "Per Curiam Affirmed".

By constitutional amendment of Art. 5, §§ 3, 3(b)(3) the wording [in part] was changed from:

> May review by certiorari any decision of a district court of appeal that is in direct conflict with a decision of district court of appeal or of the supreme court on the same question of law.

To:

> May review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The only difference in the two versions is:

That the former version contained "by certiorari" which does not appear in the revised version.

The former version contained "that is in direct conflict" and the revised version contains "that <u>expressly</u> and directly conflicts" (Emphasis supplied)

This surely cannot be a difference that would, in effect, expunge the rights of due process.

In Jenkins Justice Sundberg pointed out at page 1357, lower right:

> * * * The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice.

While the court makes itself appear as though it has great concern for the "Justice delayed is justice denied." doctrine it has not noticed that justice delayed is superior to NO JUSTICE AT ALL, as in the case of those persons who are denied due process by the efforts of the Supreme Court to "speed up the administration of justice".

Justice Sundberg goeš on, at page 1358, upper left:

> To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

With due respect for Justice Sundberg's views, the federal system has done well for years with "intermediate courts of appeal" and has not changed the system to accomodate "speedy and efficient administration of justice".

Perhaps "due process" concerns were considered by the federal system?

Justice Adkins in his dissenting, at page 1363, lower right, lamented:

> We are embarking on a course which limits our jurisdiction to matters concerning deep questions of law, while the great bulk of litigants are allowed to founder on rocks of uncertainty and trial judges steer their course over a chaotic reef as they attempt to apply "Per Curiam Affirmed" decisions. When the constitutional amendment is considered in light of historical development

of the decisional law (as suggested by the majority), we find regression instead of progression. The majority admits that many WILL NOT OBTAIN JUSTICE (emphasis added) for our jurisdiction will be limited to resolving questions of importance to the public as distinguished from the parties. * * *.

At page 1364, center right, Justice Adkins adds:

> The majority says there was little doubt "that the electorate was informed" and proceeds to construe a purported constitutional amendment, the terms of which were not placed on the ballot * * *.
>
> The ballot says simply that the proposal would "modify the jurisdiction of the Supreme Court," giving the public little insight into the changes it would make in court appeals procedures.
>
> Given the complex nature of those procedures, few voters understand the issue.

Justice Adkins was right!

Significant federal law:

> State is not required to provide a means of appeal in order to meet demands of due process, but when state has provided means of appeal it cannot put limitations on it which are discriminatory, arbitrary, and totally unrelated

to any possible state purpose. Compton v. Naylor, 392 F. Supp. 575 (1975) at 5. Constitutional Law.

"Due process" means course of proceeding according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. U.S.C.A. Const. Amend. 14. Gordon v. Leatherman, 325 F. Supp. 494 (1971) at 5. Constitutional Law.

Procedural due process includes right to notice and opportunity to be heard at meaningful time and in a meaningful manner. U.S.C.A. Const. Amend. 14. Fuentes v. Shevin, 92 S. Ct. 1983 (1972) at 2. Constitutional Law.

While procedural due process is flexible and variable in different situations, complete absence of any due process at all cannot be justified under the guise of flexibility. U.S.C.A. Const. Amend. 14. Craig v. Carson, 449 F. Supp. 385 (1978) at 13. Const. Law.

Florida PSC v. Pruitt, Humphries, et al, 587 So. 2d 561 (Fla. 1st DCA 1991) points out, at 6. Appeal and Error:

Judgment [Order] which is fundamentally erroneous on its face may be appealed despite lack of transcript.

Harrison's "statement of the * * * proceedings made the Order fundamentally erron-

eous (in view that "transcript" of proceedings by Carl S. Harrison was not attacked by the Academy).

Ed Ricke and Sons, Inc. v. Green, 468 So. 2d 908 (Fla. 1985) held the view, at 5. Appeal and Error:

> Record on appeal was sufficient to support finding of reversible error where one party ordered clerk to designate eight portions of transcript as record on appeal, and opposing party failed to designate additional portions of transcript, thereby admitting nothing else was necessary, and where court did not order supplementation, thereby concluding that nothing else was necessary * * *.

And Warner and Swasey Co. v. Insurance Co. of No. Amer., 292 So. 2d 45 (Fla. 2nd DCA 1974) says:

> To find fault with a minimal, but sufficient, assertion of good cause why the action should remain pending, which assertion was made in response to a MOTION (emphasis added) to dismiss for failure to prosecute, which was not attacked in the trial court as insufficient and which was not shown of record to be unproved, would be a departure from the responsibility of an appellate tribunal * * *.

Stare decisis!

CONCLUSION

"Hearing" April 29, 1991 was not fair to Harrison. Harrison could not have had an "opportunity to be heard at a meaningful time and in a meaningful manner" in view of its six minutes duration (Fuentes, page 34).

The "facts upon which judgment [Order] is based" have not been made known to Harrison (United States of America, page 12; Order of Dismissal, Appendix "A").

"Lower court must be affirmed * * * where it has failed to state the basis for its decision" (International Community Corp., page 12).

The Florida 5th DCA has not made known to Harrison the "valid basis in the record" for its "Per Curiam Affirmed" decision March 24, 1992 (Appendix "B").

The Florida Supreme Court told Harrison that it is without jurisdiction to review a "Per Curiam Affirmed" decision without

opinion (Jenkins, page 29).

Harrison was not FOREWARNED of fatal effect of not having a court reporter.

For those reasons Harrison was denied SUBSTANTIVE DUE PROCESS.

Florida Rule of Appellate Procedure 9.200 is vague, often miscited and repug- to "fair play". It is vague because it does not provide explicit standards for its enforcement; vague law impermissively assigns basic policy matters to judges for resolution on subjective issues, with attendant dangers of arbitrary and discriminatory application, and, it is vague because it lacks clarity and expression.

Florida Rule of Appellate Procedure 9.200 should be UNCONSTITUTIONAL.

For these reasons Harrison was denied PROCEDURAL DUE PROCESS.

The United States Supreme Court should issue a Writ of Certiorari to review the

Order of the Circuit Court of Lake County, Florida, Florida Fifth Judicial Circuit, rendered July 9, 1991 and subsequent affirmance of that Order by the Florida Fifth District Court of Appeal and the dismissal of the appeal of that Order by the State of Florida Supreme Court because it lacked jurisdiction.

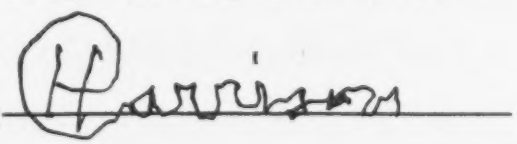
So be it!

It is to be noted that 28 U.S.C.A. § 2403(b) may be applicable insofar as Florida Rule of Appellate Procedure 9.200 and West's F.S.A. Const. Art. 5, §§ 3, 3(b)(3) and ancillary rules and/or laws may deprive a person due process rights.

Petitioner knows not if the constitutionality of those rules or statutes have been been certified to any court of Florida.

DATED: July 7, 1992
Resubmitted September 30, 1992

Respectfully submitted'



IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR LAKE COUNTY

CARLYLE L. HARRISON,
Plaintiff,
vs.
MONTVERDE ACADEMY,
Defendant. /

CASE NO.
90-288-CA-01

ORDER OF DISMISSAL

This Court having reviewed the Court file and noting that a hearing was held April 29, 1991, upon the Notice of Failure to Prosecute, and the Plaintiff having filed a Motion to Reinstate Complaint which is in the nature of a Motion for Rehearing, it is thereupon

ORDERED AND ADJUDGED that Plaintiff's Motion to Reinstate Complaint be and the same hereby is denied, and that this case is dismissed without prejudice.

DONE AND ORDERED in Chambers at Tavares, Lake County, Florida, this 9th day of July, 1992.

(signature)
DON F. BRIGGS
Circuit Judge

Copies provided to:

Carlyle L. Harrison
315 North Bonita Avenue
Panama City, FL 32401

C. Michael Duncan
Post Office Box 1049
Tavares, FL 32778-1049

APPENDIX "A"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT JANUARY TERM 1992

CARLYLE L. HARRISON,

Appellant,

v.

MONTVERDE ACADEMY, etc.,

Appellee.

CASE NO.: 91-1758

Not final until the time expires to file rehearing motion, and, if filed, disposed of.

Decision filed March 24, 1992

Appeal from the Circuit Court
for Lake County
Don F. Briggs, Judge

Carlyle L. Harrison,
Panama City, pro se.

C, Michael Duncan of C. Michael Duncan, P.A., Tavares, for Appellee.

PER CURIAM.

AFFIRMED.

COBB and GRIFFIN, JJ., and JOHNSON, W.C., jr., associate Judge, concur

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

CARLYLE L. HARRISON,

Appellant,

v. Case No. 91-1758

MONTVERDE ACADEMY, etc.,

Appellee.
_____/

DATE: April 9, 1992

BY ORDER OF THE COURT:

ORDERED that the MOTION FOR REHEARING, filed March 31, 1992, is denied.

I hereby certify that the foregoing is (a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: (Signature)
Deputy Clerk)

(COURT SEAL)

cc; Carlyle L. Harrison
C. Michael Duncen, Esq.

APPENDIX "C"

SUPREME COURT OF FLORIDA

TUESDAY, MAY 26, 1992

CARLYLE L. HARRISON,	**	CASE NO. 79,847
Petitioner,	**	District Court of Appeal 5th District -
v.	**	
MONTVERDE ACADEMY, ETC.,	**	No. 91-1758
Respondent.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

(SEAL)
A True Copy

TEST

Sid J. White
Clerk
Supreme Court

H
cc: Hon. Frank J. Habershaw, Clerk
Hon. James C. Watkins, Clerk
Hon. Don F. Briggs, Judge
Carlyle L. Harrison, Panama City
C. Michael Duncan, Esq.

APPENDIX "D"

DISTRICT COURT OF APPEAL
FIFTH DISTRICT

300 South Beach Street
Daytona Beach, Florida 32114
(904) 255-8600

CARLYLE L. HARRISON,

Appellant,

v,

MONTVERDE ACADEMY, ETC.,

Appellee.

5DCA CASE NO.: 91-01758

LAKE

L. T. CASE NO.: 90-288-CA-01

August 13, 1991

MOTION TO DISMISS

The Appellee, MONTVERDE ACADEMY, moves to dismiss this appeal on the grounds that it is not from a final order of the lower court as required by Rule 9.030(b), RULES OF APPELLATE PROCEDURE; specifically, the Appellent seeks review of the lower court's ORDER OF DISMISSAL of July 9, 1991, which provides that " . . . this case is dismissed without prejudice." Further, this case does not fall within any of the exceptions set forth in Rule 9.130(a), RULES OF APPELLATE PROCEDURE.

WHEREFORE Appellee moves for dismissal.

I HEREBY CERTIFY that a copy hereof has been furnished to CARLYLE L. HARRISON, Appellant, 315 North Bonita Avenue, Panama City, FL. 32401 by mail on the 13th day of August, 1991.

(signature)
C. MICHAEL DUNCAN, P.A.
Post Offic Box 1049
Tavares, FL 32778-1049
(904) 343-2041
ATTORNEY FOR APPELLEE
FL BAR # 013711

APPENDIX "E"

IN THE FLORIDA FIFTH
DISTRICT COURT OF APPEAL

CARLYLE L. HARRISON,

Appellant,

v.

MONTVERDE ACADEMY, Etc.,

Appellee.
_____/

CASE NO: 90-288-CA-01

APPEAL NO: 91-01758

RESPONSE TO APPELLEE'S MOTION TO DISMISS

The appellant, Carlyle L. Harrison, responds to appellees Motion to Dismiss, as follows:

1. The Order of Dismissal stated "* * * this case is dismissed without prejudice", (Order attached).

2. Other jurisdictions provide "* * * the plaintiff may commence a new action after the expiration of limitations and within one year after such termination". Tietjen v. Heberlein, 171 P, 928, 54 Mont. 486.

3. Florida law allows no such provision in Rules of Civil Procedure rule 1.420(b) and (e).

4. The time to bring suit in this action has expired.

5. This, in effect, makes the Order of Dismissal a final Order, appealable per rule 9.030(b)(1)(A).

WHERFORE appellant respecfully (sic) asks this court to issue its Order denying appellee's Motion to Dismiss.

CERTIFICATE OF SERVICE

I CERTIFY copy hereof has been mailed to C. Michael Duncan, P.O. Box 1049, Tavares, fl 32778-1049 on August 21, 1991.

(signature)

Carlyle L. Harrison, Appellant
315 North Bonita Avenue
Panama City, FL 32401
(904) 769-5037/Please call COLLECT

APPENDIX "F"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

CARLYLE L. HARRISON,

Appellant,

Case No. 91-1758

v.

MONTVERDE ACADEMY, etc.,

Appellee. /

DATE: August 29, 1991

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION TO DISMISS, filed August 15, 1991, is denied.

I hereby certify that the foregoing is (a true copy of) the original court order.

(signature)

FRANK J. HABERSHAW, CLERK

BY: ----------
Deputy Clerk

(COURT SEAL)

cc: C. Michael Duncan, Esq.
Carlyle L. Harrison

APPENDIX "G"

IN THE FIFTH JUDICIAL CIRCUIT COURT IN AND FOR LAKE COUNTY, FLORIDA

CARLYLE L. HARRISON,
Plaintiff,
v. CASE NO: 90-288-CA-01

MONTVERDE ACADEMY, (A NOT FOR PROFIT FLORIDA CORPORATION),
Defendant.
_____/

MOTION TO REINSTATE COMPLAINT

COMES NOW the Plaintiff, CARLYLE L. HARRISON, who moves the court to reinstate the Complaint in the above-numbered case, and in so doing says:

1. A hearing was held from 11;40 until 11;46 before judge Ernest C. Aulls, Jr., on April 29, 1991, in chambers, and at this hearing he found Carlyle L. Harrison guilty of "Failure to Prosecute" the above-titled cause and Dismissed the action.

At the hearing judge Aulls stated, "I have a strict policy that if nothing is done on a case in a year I dismiss them automatically. Goodbye."

2. Plaintiff, Carlyle L. Harrison received the attached Exhibit 1 on April 8, 1991.

APPENDIX "H-1"

3. Plaintiff, Carlyle L. Harrison delivered by mail the attached Exhibits 2, 3 and 4, as addressed. Judge Aulls had copies of Exhibits 2, 3, and 4 before him at the hearing.

4. In A & W Electric of Miami, Inc. v. Abraira, 567 So. 2d 36 it was held:

> Plaintiff's double bypass heart surgery and subsequent period of rehabilitation was sufficient excuse for for the failure to prosecute claim within one year, precluding dismissal for lack of prosecution.

5. In Schlakman v. Helliwell, Melrose & DeWolf, 519 So. 2d 14 it was held:

> Attorney against whom legal malpractice action was commenced were not entitled to have action dismissed based upon client's failure to prosecute; client's physical disability which rendered her periodically bedridden constituted good cause which enabled her to proceed with action.

6. In Barnes v. Ross, 386 So. 2d 812 it was held:

> Only activity on face of record will automatically preclude dismissal for failure to prosecute, but nonrecord activity may constitute good cause to avoid such dismissal, and

Physical disability of plaintiff or plaintiff's attorney constitutes good cause justifying trial court's refusal to dismiss for failure to prosecute.

WHEREAS THE PLAINTIFF Carlyle L. Harrison has suffered extensive physical disability, and

WHEREAS the above-named cases were cases in which dismissals were reversed, and

WHEREAS Appellate procedure is costly, time consuming (which would delay this action yet further) and punitive (in cases without merit) the Plaintiff,

THEREFORE moves the court to rescind and vacate its decision of April 29, 1991 and to reinstate the Complaint of Harrison v. Montverde Academy, Case No. 90-288-CA-01.

CERTIFICATE OF SERVICE

I CERTIFY copy of the foregoing has been sent by U.S. Mail to C. Michael Duncan, P.O. Box 1049, Tavares, FL 32778-1049 on May 17, 1991.

(signature)

Carlyle L. Harrison
315 North Bonita Avenue
Panama City, FL 32401
(904) 769-5037/Please call COLLECT

CONCLUSION

Finding Appellant guilty of Failure to prosecute was error in view of his timely notice of Good Cause.

The court treated the matter as non-discretionary when, in fact, it should have been treated as a discretionary.

The "hearing" was unfair to the Appellant in view of its abruptness. Its duration was a mere six minutes.

Appellant is guaranteed a fair and impartial hearing.

The court's handling of this matter was an abuse of discretion.

The Order to Dismiss should be REVERSED that Appellant has his day in court.

Respectfully submitted
Carlyle L. Harrison, Appellant
315 North Bonita Avenue
Panama City, FL 32401
(904) 769-5037/Please call collect

APPENDIX "I"

CARLYLE L. HARRISON
315 NORTH BONITA AVENUE
PANAMA CITY, FL 32401

FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, FLORIDA

vs.

MONTVERDE ACADEMY
c/o C. MICHAEL DUNCAN, ESQUIRE
P. O. BOX 1049
TAVARES, FL 32778

NOTICE OF FAILURE TO PROSECUTE
AND NOTICE OF HEARING

it appears on the face of the record that no activity by filing of pleadings, order of the court, or otherwise has occurred for a period of one (1) year.

Upon instructions from the Honorable Ernest C. Aulls, Jr., Circuit Judge, and pursuant to Administrative Order 86-6, you are hereby notified that this action is subject to dismissal and that unless good cause can be shown in writing, filed at least five (5) days prior to APRIL 29, 1991 this cause will be dismissed on said date pursuant to Rule 1.420(e) RCP by Order of the Court.

If a showing of good cause is filed, a hearing on the question shall be held on APRIL 29, 1991, at 11:30 A.M. before the above named Circuit Judge, in his Chambers, at the Lake County Courthouse in Tavares, Florida.

Please govern yourself accordingly.

JAMES C. WATKINS, CLERK
BY:(signature)
Deputy Clerk

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that copies hereof have been furnished by mail this 4 day of APRIL, 1991. to CARLYLE L. HARRISON and C. MICHAEL DUNCAN, ESQUIRE.

JAMES C. WATKINS, CLERK
BY: (signature)
Deputy Clerk

U. S. CONSTITUTION-AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RULE 9.200 THE RECORD

(a) Contents.

(1) The record shall consist of the original documents, exhibits, and transcript of proceedings, if any, filed in the lower tribunal, except summonses, praecipes, subpoenas, returns, notices, depositions, other discovery and physical evidence.

(2) Within 10 days of filing the notice of appeal an appellant may direct the clerk to include or exclude other documents or exhibits filed in the lower tribunal. The directions shall be substantially in the form prescribed by Rule 9.900(f). If the clerk is directed to transmit less than the enyire record or less than the transcript of all testimony in a proceeding, the appellant

shall serve with such direction a statement of the judicial acts to be reviewed. Within 20 days of filing the notice, an appellee may direct the clerk to include additional documents and exhibits.

(3) Stipulated Statement. The parties may prepare a stipulated statement showing how the issues to be presented arose and were decided in the lower tribunal, attaching a copy of the order to be reviewed and as much of the record in the lower tribunal as is necessary to a determination of the issues to be presented. The parties shall advise the clerk of their intention to rely upon a stipulated statement in lieu of the record as early in advance of filing as possible. The stipulated statement shall be filed by the parties and transmitted to the court by the clerk of the lower tribunal within the time prescribed for transmittal of the record.

(b) Transcript of Proceedings.

(1) Within 10 days of filing the notice, the appellant shall designate those portions of the transcript of proceedings not on file deemed necessary for inclusion in the record. Within 20 days of filing the notice, an appellee may designate additional portions of the proceedings. Copies of designations shall be served on the court reporter. Costs of the original and all copies of the transcript of proceedings shall be borne initially by the designating party, subject to appropriate taxation of costs as prescribed by Rule 9.400. At the time of the designation, unless other satisfactory arrangements have been made, the

designating party must make a deposit of one-half of the estimated transcript costs, and must pay the full balance of the fee upon delivery of the completed transcript.

(2) Within 30 days of service of a designation, or within the additional time provided for under subsection(b)(3) of this rule, the court reporter shall transcribe and deliver to the clerk of the lower tribunal the designated proceedings and shall furnish copies as requested in the designation. If a designating party directs the court reporter to furnish the transcript to fewer than all parties, that designating party shall serve a copy of the designated portion of the transcript on the parties within 5 days of receipt from the court reporter. The transcript of proceedings shall be securely bound in volumes not to exceed 200 pages each. Each volume shall be prefaced by an index containing the names of the witnesses, a list of all exhibits offered and introduced in evidence, and the pages where each may be found.

(3) Upon service of a designation, the reporter shall acknowledge at the foot of the designation the fact that it has been received and the date on which the reporter expects to have the transcript completed and shall transmit the designation, so endorsed, to the parties and to the clerk of the appellate court within 5 days of service. If the transcript cannot be completed within 30 days of service of the designation, the reporter shall request such additional time as is reasonably necessary and shall state the reasons therefore. When

the reporter requests an extension of time, the court shall allow the parties 5 days in which to object or agree. The appellate court shall approve the request or take other appropriate action and shall notify the reporter and the parties of the date the transcript is due.

(4) If no report of the proceedings was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days of service. Thereafter, the statement and any objectionb or proposed amendments shall be submitted to the lower tribunal for settlement and approval. As settled and approved, the statement shall be included by the clerk of the lower tribunal in the record.

(c) Cross Appeals. Within 20 days of filing the notice, a cross appellant may direct that additional documents, exhibits, or portions of the transcript of proceedings be included in the record. If less than the entire record is designated, the cross appellant shall serve, with directions, the judicial acts to be reviewed. The cross appellee shall have 10 days after such service to direct further additions. The time for preparation and transmittal of the record shall be extended by 10 days.

(d) Duties of Clerk; Preparation and transmittal of Record.

(1) The clerk of the lower tribunal shall prepare the record as follows:

(A) Upon receipt of the transcript of proceedings from the court reporter(s), each page shall be consecutively numbered. The transcript of proceedings shall be securely bound in consecutively numbered volumes not to exceed 200 pages each. The clerk of the lower tribunal shall not be required to verify and shall not charge for the incorporation of the transcript of proceedings into the record.

(B) The remainder of the record, including all supplements, shall be prepared as designated. Each page shall be consecutively numbered. The record shall be securely bound in consecutively numbered volumes not to exceed 200 pages each. The cover sheet of each volume shall contain the name of the lower tribunal and the style and number of the case.

(2) The clerk of the lower tribunal shall prepare a complete index to the record.

(3) The clerk of the lower tribunal shall certify and transmit the record to the court as prescribed by these rules; provided that when the parties stipulate or the lower tribunal orders that the original record be retained, the clerk shall prepare and transmit a certified copy.

(e) Duty of Appellant or Petitioner. The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or appellant. Any party may enforce the provisions of this rule by motion.

(f) Correcting and Supplementing the Record.

(1) If there is an error or omission in the record the parties by stipulation, the lower tribunal before the record is transmitted, or the court may correct the record.

(2) If the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined because the record is incomplete until an opportunity to supplement the record has been given.

(g) Return of Record. In civil cases the record shall be returned to the lower tribunal after final disposition by the court.

Amended July 3, 1980, effective Jan. 1, 1981 (387 So.2d 920); Nov. 26, 1980, effective Jan 1. 1981 (391 So.2d 203); June 8, 1987, effective July 1, 1987 (509 So.2d 276); July 14, 1988, effective Jan. 1, 1989 (529 So.2d 687); Dec. 30, 1988, effective Jan. 1, 1989 (536 So.2d 240).

COMMITTEE NOTES

1977 Revision. This rule replaces former Rule 3.6 and represents a complete revision of the matters pertaining to the record for an appellate proceeding. References in this rule to "appellant" and "appellee" should be treated as equivalent to "petitioner" and "respondent", respectively. See Commentary, Fla. R. App. P. 9.020. This rule is based in part on Federal Rule of Appellate Procedure 10(b).

Subsection (a)(1) establishes the content of the record unless an appellant within 10 days of filing the notice directs the clerk to exclude portions of the record or to include additional portions, or the appellee within 20 days of the notice being filed directs inclusion of additional portions. in lieu of a record, the parties may prepare a stipulated statement, attaching a copy of the order which is sought to be reviewed and essential portions of the record. When a stipulated statement is prepared, the parties must advise the clerk not to prepare the record. The stipulated statement is to be filed and transmitted within the time prescribed for transmittal of the record. Where less than a full record is to be used, the initiating party must serve a statement of the judicial acts to be reviewed so that the opposing*may determine whether additional portions of the record are required. Such a statement is not intended to be the equivalent of assignments of error under former Rule 3.5. Any inadequacy in the statement may be cured by motion to supplement the record under Section (f) of this rule. (*=party)

Section (a) interacts with Section (b) so that as soon as the notice is filed the clerk of the lower tribunal will prepare and transmit the complete record of the case as described by the rule. In order to include in the record any of the items automatically omitted, a party must designate the items desired. A transcript of the proceedings before the lower tribunal will not be prepared or transmitted unless already filed, or the parties designate the por-

tions of the transcript desired to be transmitted. Subsection (b)(2) imposes an affirmative duty to prepare the transcript on the reporter of the proceedings as soon as designated. It is intended that to complete the preparation of all official papers to be filed with the court, the appellant need only file the notice, designate omitted portions of the record which are desired and designate the desired portions of the transcript. It therefore will be unnecessary to file directions with the clerk of the lower tribunal in most cases.

Subsection (b)(1) replaces former Rule 3.6(d)(2), and specifically requires service of the designations on the court reporter. This is intended to avoid delays which sometimes occur when a party files his designation, but fails to notify the court reporter that a transcript is needed. The rule also establishes the responsibility of the designating party to initially bear the cost of the transcript.

Subsection (b)(2) replaces former Rule 3.6(e). This rule provides for the form of the transcript, and imposes on the reporter the affirmative duty of delivering copies of the transcript to the ordering parties upon request. Such a request may be included in the designation. Under Section (e), however, the responsibility for insuring performance remains with the parties. The requirement that pages be consecutively numbered is new and is deemed necessary to assure continuity and ease of reference for the convenience of the court. This requirement applies even where two or more parties designate por-

tions of the proceedings for transcription. It is intended that the transcript portions transmitted to the court constitute a single consecutively numbered document in one or more volumes not exceeding 200 pages each. Where there is more than one court reporter, the clerk will renumber the pages of the transcript copies so that they are sequential. The requirement of a complete index at the beginning of each volume is new, and is necessary to standardize the format and for the guidance of those preparing transcript.

Subsection (b)(3) provides the procedures to be followed where no transcript is available.

Section (c) provides the procedures to be followed where there is a cross appeal or cross petition.

Section (d) sets forth the manner in which the clerk of the lower tribunal is to prepare the record. The original record is to be transmitted unless the parties stipulate or the lower court orders the original be retained, unless the court orders otherwise.

Section (e) places the burden of enforcement of this rule on the appellant or petitioner, but any party may move for an order requiring adherence to the rule.

Section (f) replaces former Rule 3.6(1). The new rule is intended to assure that appellate proceedings will be decided upon their merits and that no showing of good cause, negligence or accident be required before the lower tri-

bunal or the court orders completion of the record. This rule is intended to assure that any portion of the record before the lower tribunal which is material to a decision by the court will be available to the court. It is specifically intended to avoid those situations which have occurred in the past where an order has been affirmed because appellate counsel failed to bring up the portions of the record necessary to determine whether or not there was an error. See Pan American Metal Products Co. v. Healy, 138 So.2d 96 (Fla. 3d DCA 1962). The rule is not intended to cure inadequacies in the record which result from the failure of a party to properly make a record during the proceedings in the lower tribunal. The purpose of the rule is to give the parties an opportunity to have the appellate proceedings decided on the record before the lower tribunal. This rule does not impose on the lower tribunal or the court a duty to review on their own the adequacy of the preparation of the record. A failure to supplement the record after notice by the court may be held against the party at fault.

Section (g) requires that the record in civil cases be returned to the lower tribunal after final disposition by the court regardless of whether the original record or a copy.

315 North Bonita Avenue
Panama City, FL 32401
April 10, 1991

Honorable James C. Watkins
Clerk of the Courts
315 West Main Street
Tavares, FL 32778

RE: Case No. 90-288-CA-01

In response to your NOTICE OF FAILURE TO PROSECUTE AND NOTICE OF HEARING.

On April 10, 1990 I suffered a stroke which caused an eighty percent loss of use of the extremities on the right side of my body. Since that time I have spent several months in a wheel chair and/or in physical therapy, speech therapy and occupational therapy (three times per week-having just completed the more recent session April 1, 1991).

Also, two hospitalizations (gallstone attacks) and many visits to doctors' offices and biopsies (negative) for suspected cancer have kept me pretty busy with health problems. And this does not include the problems caused by a double bypass operation for suspected cancer (negative) of the liver and pancreas 5-30-86.

This, I believe, constitutes "good cause" for my Failure to Prosecute.

My apologies for not apprising the court of the problem causing the delay.

(signature)
Carlyle L. Harrison

cc: C. Michael Duncan
Judge Ernest C. Aulls, Jr.

APPENDIX "L"

315 North Bonita Avenue
Panama City, FL 32401
April 10, 1991

Honorable Ernest C. Aulls, Jr.
Circuit Judge
315 West Main Street
Tavares, FL 32778

Enclosed please find:

1. Letter to James C. Watkins explaining my delay of prosecution.
2. Order Denying Motion to Dismiss, Case No. 90-288-CA-01, and copies.
3. Envelope for mailing signed copy of Order, if needed (2).

Barring unforseen circumstances(there's beeb an unusual large amount of them this past year) I shall be present for the hearing April 29, 1991.

Because of the long distance I must travel could you please:

A. If you sign the enclosed order, schedule the pre-trial hearing durthe time of the hearing for "Failure to Prosecute"?

B. If you do not sign the enclosed order, schedule a hearing on the Motion to Dismiss?

Please call COLLECT if there is a need or other occasion.

(signature)

Carlyle L. Harrison
(904) 769-5037/Please call COLLECT

APPENDIX "M"

315 North Bonita Avenue
Panama City, FL 32401
April 10, 1991

Mr. C. Michael Duncan
P.O. Box 1049
Tavares, FL 32778-1049

Dear Mr. Duncan

Pardon th[e] delay. As the enclosed shows--I had "good cause".

Would you contact Mr. Stephens and inform him I am willing to settle this cause for $10,000.

You might apprise him of the cost to fight this matter as far as the 5th in New Orleans. Under the circumstances I do not believe he stands a chance of any recovery costs, fees, etc. if he should be fortunate enough to prevail. And it might avoid adverse publicity for the academy.

I have computed the amount due me at in excess of $34,000. The court may find more. Health reasons bring me to make this offer. Also I have an appeal before the Florida Supreme Court (Case No. 77,113) which keeps me about as busy as I care to be.

You may find my work sloppy and unprofessional but, I assure you, it is most effective.

If this meets with your approval, perhaps we can have an agr[e]ement in time to negate the need for the April 29, 1991 hearing????

(signature)
Carlyle L. Harrison

APPENDIX "N"

315 North Bonita Avenue
Panama City, FL 32401
April 30, 1992

West Publishing Co.
50 West Kellogg Boulevard
St. Paul, Minnesota

RE: ERROR IN FLORIDA RULES OF COURT (Fla. R. App. P. 9.200(b)([3]).

I have enjoyed Florida Rules of Court (State & Federal) and consider the purchase one hellava bargain.

But, I have run into a little trouble with the above rule, i. e.

504 So. 2d 418 at lower left it says "West's F.S.A. R. App. Rule 9.200(a)(3), (b)(3)". Shouldn't that be "(b)(4)"?

And on lower right (eight lines from bottom)--Ditto.

386 So. 2d 896 (Footnote[1] at bottom--Ditto.

366 So. 2d 402 at p. 404 (Footnote[2] at bottom)--Ditto., etc. etc.

In Rules of Court (State) at p. 551 it says, "Subsection (b)(3) provides the procedure to be followed where no transcript is available." Isn't that (b)(4)?

And there are no "Committee Notes["] for (One or the other) (b)(3) or (b)(4).

If this is news to you please send the $10,00 reward (check or money order). Or you may wish to send a voucher in a like amount (more or less) for your publications.

(Continued next page)

APPENDIX "O-1"

(Continued from previous page)

Would you please also send me a catalog of your publications or in the alternative send me a list of those publications that may be of interest to a pro se litigant that may soon appeal to the U. S. Supreme Court.

And maybe you can elaborate on the "Committee Notes" on (b)(3) and/or (b)(4).

(signature)
Carlyle L. Harrison

APPENDIX "O-2"

West Publishing Company
610 Opperman Drive
P. O. Box 64526
St. Paul, MN 55164-0526

May 11, 1992

Mr. Carlyle L. Harrison
315 North Bonita Avenue
Panama City, FL 32401

RE: Florida Rules of Court, State and Federal Rule 9.200(b) of the Florida Rules of Appellate Procedure

Dear Mr. Harrison:

Thank you for your April 30, 1992 letter.

We will examine the matters you raise concerning Rule 9.200(b) of the Florida Rules of Appellate Procedure before we publish our next edition of Florida Rules of Court, State and Federal.

We have enclosed with this letter a copy of our Coordinated Research page for Florida. You may call 1-800-328-9352 to order any of these publications and services.

Thank you for your interest in our publication.

Very truly yours,
WEST PUBLISHING COMPANY
Editorial Department

Enclosure

APPENDIX "P"

(Handwritten notes of Carl S. Harrison)

11:40 AM 4-29-91

J. AULLS - NOTIFIED US OF S. CT RULING TO DISMISS CASES THAT DON"T "MOVE ALONG."

DUNCAN [Defendant's counsel]

1. DOESN'T KNOW IF P. HAS ENOUGH IN CASE TO WARRANT CONTINUING

2. IF COURT DOES FIND I FILED MOTION TO DISSMISS & P FILED OPPOSITION - DUNCAN

J. AULLS - HAS STRICT POLICY THAT IF NOTHING IS DONE IN CASE IN A YEAR THAT HE "DISMISSES THEM AUTOMATICALLY..." "GOODBYE

I. CARL S. HARRISON, TRANSCRIBED THE ORIGINAL OF THE ABOVE NOTES AT A HEARING BEFORE JUDGE ERNNEST C. AULLS., JR., ON APRIL 29, 1991 AND SWEAR THEY ARE TRUE AND CORRECT.

(signature)
CARL S. HARRISON

State of Florida
County of Orange

The foregoing instrument was acknowledged before me this 14th day of February, 1992.

(signature)
Notary Public - Linda T. Seaman

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
MY COMMISSION EXPIRES MAY 4, 1993
BONDED THRU NOTARY PUBLIC UNDERWRITERS

APPENDIX "Q"